(2)

Supreme Court, U.S.
FILED
JAN 7 1994
OFFICE OF THE CLERK

No. 93-538

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF HUNTINGTON, WEST VIRGINIA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

DAVID ENGLISH CARMACK
EDWARD T. PERELMUTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly held that the United States is constitutionally immune from liability for a municipal service charge assessed against federal property.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

City of Fairmont v. *Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 (W. Va. 1983), cert. denied, 466 U.S. 958 (1984)	7
Duling Bros. Co. v. *City of Huntington*, 120 W. Va. 85 (1938)	2
Federal Reserve Bank v. *Metro Center Improvement District #1*, 657 F.2d 183 (8th Cir. 1981), aff'd, 455 U.S. 995 (1982)	6
Hare v. *City of Wheeling*, 298 S.E.2d 820 (W. Va. 1982)	7
Huse v. *Glover*, 119 U.S. 543 (1886)	6
Massachusetts v. *United States*, 435 U.S. 444 (1978)	4
Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976)	5
Mullen Benevolent Corp. v. *United States*, 290 U.S. 89 (1933)	4, 5-6
National Cable Television Ass'n v. *United States*, 415 U.S. 336 (1974)	6-7
Packet Co. v. *Keokuk*, 95 U.S. 80 (1877)	6
South Carolina v. *Baker*, 485 U.S. 505 (1988)	4
United States v. *City of Columbia, Mo.*, 914 F.2d 151 (8th Cir. 1990)	4, 5
United States v. *County of Allegheny*, 322 U.S. 174 (1944)	4, 8
United States v. *County of Fresno*, 429 U.S. 452 (1977)	4
United States v. *Harford County*, 572 F. Supp. 239 (D. Md. 1983)	7-8

Cases—Continued: Page

United States v. *LaFranca*, 283 U.S. 568 (1931) 5, 7
United States v. *New Mexico*, 455 U.S. 720 (1982) .. 4
United States v. *River Coal Co.*, 748 F.2d 1103 (6th Cir. 1984) 7
United States v. *Tax Commission of Mississippi*, 421 U.S. 599 (1975) 5, 7
Van Brocklin v. *Tennessee*, 117 U.S. 151 (1886) 4

Constitution, statutes, and ordinance:

U.S. Const.:
Art. I, § 10, Cl. 3 6
Art. VI, Cl. 2 (Supremacy Clause) 6
12 U.S.C. 531 10
12 U.S.C. 1452(d) 10
15 U.S.C. 713a-5 10
15 U.S.C. 2210 .... 8, 9
15 U.S.C. 2210(a) 9
15 U.S.C. 2210(b) 9
15 U.S.C. 2210(b)(1) 10
31 U.S.C. 6902 11
31 U.S.C. 6902(a) 11
City of Huntington, W. Va., Ordinance:
§ 773.03 (Feb. 13, 1990) 2
§ 773.03(a) (Apr. 2, 1991) 3
§ 773.04(a) (July 30, 1985) 2
§ 773.04(b) (July 30, 1985) 3
§ 773.05 (Feb. 13, 1990) 3
§ 955.20 (June 8, 1987) 2

Miscellaneous:

60 Comp. Gen. 637 (1981) 11

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-538

CITY OF HUNTINGTON, WEST VIRGINIA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 999 F.2d 71. The opinion of the district court (Pet. App. A9-A12) is reported at 793 F. Supp. 1370.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1993. The petition for rehearing was denied on July 6, 1993. The petition for a writ of cer-

tiorari was filed on October 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Beginning in 1985, the city of Huntington, West Virginia (petitioner) enacted a series of ordinances imposing municipal service charges on owners of residential and commercial property located in the municipality (Pet. App. A2). The original ordinance assessed a charge for fire protection services. In 1987, petitioner enacted a second ordinance imposing a charge for flood protection[1] in addition to the fire protection charge. Subsequently, petitioner combined the fire and flood protection charges into a single "municipal service fee." Under a 1991 amendment, the municipal service fee finances improvements to streets and municipal infrastructure as well as fire and flood protection services (*ibid.*). The charges imposed by petitioner have been assessed at rates based primarily on the square footage of the property.[2]

---

[1] The revenue supports a floodwall maintained by the city. The floodwall was constructed almost entirely with federal funds. See *Duling Bros. Co.* v. *City of Huntington*, 120 W. Va. 85, 87 (1938) (federal government to provide $3 million of $3,410,000 cost of floodwall).

[2] The fire protection charge imposed in 1985 was assessed at the rate of $.03 per square foot. City of Huntington, W. Va., Ordinance §§ 773.04(a) and (b) (July 30, 1985). The 1987 ordinance provided that the fire and flood protection charges would be assessed at the combined rate of $.0375 per square foot. *Id.* § 955.20 (June 8, 1987). The Municipal Service Fee enacted in 1990 was assessed at the rate of $.0375 per square foot plus an annual assessment of $70 per lot. *Id.* § 773.03 (Feb. 13, 1990). The Municipal Service Fee is presently assessed at the rate of $.0575 per square foot plus

Prior to 1990, the charges were enforceable through civil and criminal sanctions. The 1990 ordinance imposes a civil penalty on delinquent accounts but does not provide for the imposition of criminal penalties.[3]

2. Petitioner has consistently assessed the municipal service charge against federal property owned by the United States Postal Service (Postal Service) and the United States General Services Administration (GSA). In 1992, the Postal Service and GSA filed an action for declaratory and injunctive relief contending that the assessments against federal property violated the federal government's constitutional immunity from state taxation. The district court rejected this contention on the ground that the municipal service charge was a "user fee" and not a "tax" (Pet. App. A10-A11). The court concluded that the exaction represented a reasonable attempt to charge users for fire and flood protection services (*id.* at A10).

3. The court of appeals reversed. Looking to the "real nature" of the municipal service charge, the court of appeals concluded that the assessment was "a tax in the most classic sense of the term" (Pet. App. A4). The court held that the Postal Service and GSA were constitutionally immune from liability because the municipal service charge was only "a thinly disguished tax" (*id.* at A6).

---

an annual assessment of $80 per lot. *Id.* § 773.03(a) (Apr. 2, 1991).

[3] City of Huntington, W. Va., Ordinance § 773.05 (Feb. 13, 1990).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. It is axiomatic that a State may not assess a tax directly upon the United States. *South Carolina* v. *Baker*, 485 U.S. 505, 523 (1988); *United States* v. *New Mexico*, 455 U.S. 720, 733-735 (1982); *United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977). This principle applies as well to taxes assessed against federal property. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 91 (1933); *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 179-180 (1886). In determining whether an assessment on the federal government or on federal property constitutes an impermissible "tax" or a permissible "user fee," the appropriate analysis focuses on the "real nature" of the exaction. *United States* v. *County of Allegheny*, 322 U.S. 174, 184 (1944); *United States* v. *City of Columbia, Mo.*, 914 F.2d 151, 154 (8th Cir. 1990).[4]

---

[4] This Court has adopted a three-part test in determining whether a federal exaction infringes on the States' immunity from federal taxation. In *Massachusetts* v. *United States*, 435 U.S. 444 (1978), the Court held that the States are not constitutionally immune from liability for federal exactions that (i) do not discriminate against state functions, (ii) are based on a fair approximation of the benefits received, and (iii) are structured to produce revenues that will not exceed the total cost to the federal government of the benefits to be supplied. *Id.* at 466-467. As the court of appeals noted (Pet. App. A4), this three-part test is inapplicable in this case because (as discussed in *South Carolina* v. *Baker*, 485 U.S. at 523) the federal government's immunity from state taxation is broader than the States' immunity from federal taxation and arises from a different constitutional source. See *United States* v. *City of Columbia, Mo.*, 914 F.2d at 153-154.

As the court of appeals correctly observed, petitioner's municipal service charge "is a tax in the most classic sense of the term" (Pet. App. A4). To begin with, the assessment is a compulsory exaction enforceable through civil and (prior to 1990) criminal sanctions. See *United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 606 (1975) (noting that the standard definition of a tax is "an 'enforced contribution to provide for the support of government' "); *United States* v. *LaFranca*, 282 U.S. 568, 572 (1931); *United States* v. *City of Columbia, Mo.*, 914 F.2d at 155. Second, the municipal service charge supports core governmental services that benefit the general public. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 287 (1976) (observing that property taxes are devices through which a State apportions the cost of such services as police and fire protection). Third, the municipal service charge is assessed at regular intervals against owners of residential and commercial buildings in Huntington without regard to actual use of municipal services. The asserted liability for the charge "arise[s] automatically * * * from the United States' status as a property owner" in the municipality. *United States* v. *City of Columbia, Mo.*, 914 F.2d at 155-156. Finally, the ordinances imposing the municipal service charge were enacted pursuant to a provision of the West Virginia Code delegating the State's taxing power, and the revenues from the exaction are placed in the city's general revenue fund. The court of appeals properly recognized (Pet. App. A6) that petitioner's municipal service charge is thus only a "thinly disguised tax" that may not be assessed against federal property.

This case is indistinguishable for intergovernmental tax immunity purposes from *Mullen Benevo-*

lent Corp. v. *United States*, 290 U.S. 89, 91 (1933). In that case, the city of American Falls, Idaho, levied assessments against all property in the municipality in order to finance the construction of sewers and sidewalks. After the initial assessment was made, the United States acquired property in the city. When the initial assessment proved insufficient to finance the contemplated services, the city reassessed the property. The Court held that the city's assessment on land owned by the United States "was a nullity" under the Supremacy Clause. *Ibid.* See also *Federal Reserve Bank* v. *Metro Center Improvement District #1*, 657 F.2d 183 (8th Cir. 1981) (federal instrumentality immune from liability for annual assessment that financed local improvements), aff'd, 455 U.S. 995 (1982).[5]

2. Petitioner's contention (11-13) that the municipal service charge is a "user fee" and not a "tax" is without merit. To begin with, petitioner's assertion reflects a fundamental misunderstanding of the difference between a "fee" and a "tax." A fee is a charge imposed on an individual or small group that has voluntarily sought and received a benefit not conferred on the general public. See *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-

---

[5] Petitioner's reliance (Pet. 11) on *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877), and *Huse* v. *Glover*, 119 U.S. 543 (1886), is misplaced. In those cases, the Court held that Article 1, Section 10, Clause 3 of the Constitution—which provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage"—did not prohibit States from levying charges against *private* parties who utilized *state* property. *Keokuk* and *Huse*, however, have no bearing on the immunity of the federal government from general state and local exactions imposed on federal property.

341 (1974). A fee, by definition, does not encompass a compulsory exaction (such as the municipal service charge in this case) that supports services provided to the general public. An exaction of this nature is a "tax" and not a "fee." See *United States* v. *Tax Commission of Mississippi*, 421 U.S. at 606; *United States* v. *LaFranca*, 283 U.S. at 572; *United States* v. *River Coal Co.*, 748 F.2d 1103, 1106 (6th Cir. 1984) ("the chief distinction is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer"). Because petitioner's municipal service charge supports benefits provided to the general public and is assessed without regard to actual use of municipal services, it represents a proscribed tax, not a "user fee," under the established principles of these decisions.[6]

3. Petitioner's reliance (Pet. 15-16) on the fact that the municipal service charge is assessed primarily (though not exclusively) at rates based on square footage of property, as opposed to property value, is without force. The square footage method adopted by petitioner merely represents an alternative method of assessing the tax; it does not change the fact that the municipal service charge is a tax on federal property.[7] See *United States* v. *Harford*

---

[6] Petitioner is merely imposing a property tax and identifying the governmental services supported by the exaction. As the court of appeals correctly recognized (Pet. App. A5), that tactic, if approved here, would eviscerate the principle of intergovernmental tax immunity.

[7] The square footage method of assessment was a response to the West Virginia Supreme Court's decisions in *Hare* v. *City of Wheeling*, 298 S.E.2d 820 (W. Va. 1982), and *City of Fairmont* v. *Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 W. Va. 1983), cert. denied, 466 U.S. 958 (1984). In those

County, 572 F. Supp. 239, 242 (D. Md. 1983) (United States constitutionally immune from liability for annual front foot benefit assessment that financed water and sewer services). Furthermore, petitioner's suggestion (Pet. 16) that the square footage method of assessment "is reasonably calculated to charge the property owner on the basis of use" misses the mark. There is no correlation between the size of property and any actual use of fire and flood protection services.

4. Petitioner errs in contending (Pet. 13-15) that, in enacting 15 U.S.C. 2210, Congress waived the government's immunity from liability for the city's municipal service charge. This statute provides, in relevant part (*ibid.*):

> Reimbursement for costs of firefighting on federal property
>
> Filing of Claims
>
> (a) Each fire service that engages in the fighting of a fire on property which is under the jurisdiction of the United States may file a claim with the Administrator for the amount of direct expenses and direct losses incurred by such fire service as a result of fighting such fire. The

---

cases, the court held that municipal service charges assessed at rates based upon property value constituted *ad valorem* property taxes and were therefore subject to the limitations imposed by the Tax Limitation Amendment to the West Virginia Constitution. Petitioner errs in relying (Pet. 11-12) on state trial court decisions holding that municipal service charges assessed at rates based on square footage do not violate the West Virginia Constitution. The federal constitutional issue presented here is governed by federal law. *United States* v. *County of Allegheny*, 322 U.S. at 184.

claim shall include such supporting information as the Administrator shall prescribe.

Determination

(b) Upon receipt of a claim filed under subsection (a) of this section, the Administrator shall determine—

(1) what payments, if any, to the fire service or its parent jurisdiction, including taxes or payments in lieu of taxes, the United States has made for the support of fire services on the property in question;

(2) the extent to which the fire service incurred additional firefighting costs, over and above its normal operating costs in connection with the fire which is the subject of the claim; and

(3) the amount, if any, of the additional costs referred to in paragraph (2) of this subsection which were not adequately covered by the payments referred to in paragraph (1) of this subsection.

Section 2210 does not address the federal governments' immunity from general or annual assessments that finance local fire services. Indeed, the provision does not directly address the question of intergovernmental tax immunity. As the title of the statute indicates, and as the court of appeals recognized (Pet. App. A5 n.6), Section 2210 is designed to compensate state and local governments for expenses that they actually incur in combatting fires on federal property. Subsection (a) provides that state and local governments may file claims for reimbursement of direct expenses and direct losses incurred in rendering fire fighting services. Subsection (b) in

turn provides a mechanism for computing the amount of such claims to be reimbursed and further provides that this amount must reflect any prior payments made by the United States in the form of taxes or payments "in lieu of taxes" to finance the fire services. 15 U.S.C. 2210(b)(1).

While Section 2210(b)(1) provides that such claims against the United States are to be offset by any taxes (or payments in lieu of taxes) that have been paid for the support of local fire services, the statute does not waive the federal government's immunity from state and local taxes. Instead, the statute merely reduces the amount of reimbursement when federal agencies or instrumentalities already have paid taxes that support local fire services pursuant to *other federal statutes* that waive federal immunity from state and local taxation.[8] For example, Section 2210(b)(1) provides for a reduction in fire-control claims against Federal Reserve Banks which must pay state and local real estate taxes under 12 U.S.C. 531. See note 8, *supra*. Similarly, the statute provides for

---

[8] Other federal statutes explicitly waive federal immunity from state and local taxation in specific circumstances. See, *e.g.*, 12 U.S.C. 531 ("Federal reserve banks * * * shall be exempt from Federal, State and local taxation except taxes upon real estate"); 12 U.S.C. 1452(d) (the Federal Home Loan Mortgage Corporation "shall be exempt from all taxation * * * except that any real property of the Corporation shall be subject to State, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed"); 15 U.S.C. 713a-5 (same for taxation of real property owned by Commodity Credit Corporation). As these statutes demonstrate, when Congress wishes to waive federal immunity from state and local taxation, it expresses its will clearly.

a reduction in claims against the United States when the federal government has made payments "in lieu of taxes," which are payments made pursuant to federal statutes that compensate local governments for the loss of revenue occasioned by their inability to assess taxes against federal property located in the municipality. See 60 Comp. Gen. 637, 640 (1981). Statutes such as 31 U.S.C. 6902 often provide for payments by the federal government to units of local governments in which tax exempt land owned by the federal government is located. Such "in lieu" payments, when made, may be used "for any governmental purpose." 31 U.S.C. 6902(a).

5. Petitioner's suggestion (Pet. 10-11) that the decision of the court of appeals in this case will result in financial hardship is both irrelevant and erroneous. It is irrelevant because considerations of fiscal need do not justify imposition of an unconstitutional tax. It is erroneous because the decision of the court of appeals merely precludes petitioner from assessing the municipal service charge against the few federal buildings in the municipality and has no effect on the assessment of the charge against other property owners. Furthermore, petitioner ignores the fact that the benefits it receives from the federal presence in the municipality (such as employment for its residents) outweigh the modest tax revenues that it will be unable to collect under the decision in this case. Petitioner's insistence that the federal government pay the city for "flood protection" services is particularly unpersuasive in view of the fact that the city's principal flood protection system was constructed almost entirely with federal funds. See note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

DAVID ENGLISH CARMACK
EDWARD T. PERELMUTER
Attorneys

JANUARY 1994

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 301157 86093